Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 91-59)

REVOCATION OF INDIVIDUAL BROKER LICENSE NO. 5987; ALBERT KAZANGIAN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that on January 4, 1990, the Secretary of the Treasury, pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), ordered the revocation of the individual broker license no. 5987 issued to Albert Kazangian. The stay of this revocation pursuant to 19 U.S.C. 1641(e)(5), was lifted by the Court of International Trade on June 27, 1991 (Court No. 90-04-00206), and is effective immediately (July 15, 1991). Hence, the temporary reinstatement dated April 26, 1990, (T.D. 90-40) is null and void, and the subject license is revoked.

Dated: July 8, 1991.

WILLIAM J. LUEBKERT,
Acting Director,
Office of Trade Operations.

[Published in the Federal Register, July 15, 1991 (56 FR 32240)]

19 CFR Part 4

(T.D. 91-60)

CUSTOMS REGULATIONS AMENDMENT REMOVING NICARAGUA FROM LIST OF NATIONS RELATING TO FOREIGN CLEARANCE OF VESSELS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by removing Nicaragua from the list of countries for which vessels may not be cleared until complete foreign manifests and all required shipper's export declarations are filed with the district director of Customs. The Department of State has informed Customs that the democratic election held recently in Nicaragua ended any threat to U.S. national security previously posed by the Nicaraguan government.

EFFECTIVE DATE: July 15, 1991.

FOR FURTHER INFORMATION CONTACT: Glen Vereb, Carrier Rulings Branch (202-566-5706).

SUPPLEMENTAL INFORMATION:

BACKGROUND

Section 4.75, Customs Regulations (19 CFR 4.75), sets out the clearance procedures for vessels bound for foreign ports, which have incomplete cargo declarations, incomplete export declarations, and bonds given in lieu thereof. Section 4.75(c) lists the countries for which outbound vessels may not be cleared until complete foreign manifests and all required shipper's export declarations have been filed with the appropriate district director of Customs. Such action is a necessary aid to Customs in the enforcement of export laws and regulations.

Because Nicaragua had posed immediate potential export control risks, it was determined in Executive Order (E.O.) 12513 dated May 1, 1985, that the policies and actions of the Nicaraguan government constituted an unusual and extraordinary threat to the national security and foreign policy of the U.S. As a result, a national emergency was declared and trade with Nicaragua was prohibited. The national emergency described in the E.O. prohibiting trade with Nicaragua was continued by subsequent annual Presidential Notices through 1989.

Accordingly, by T.D. 87-1, published in the Federal Register on January 5, 1987 (52 FR 254), Nicaragua was added to the list of countries in § 4.75(c), Customs Regulations (19 CFR 4.75(c)). Under § 4.75(c), as noted, vessels may not be cleared to proceed to ports in any of the countries listed thereunder until complete outward foreign manifests and all required shipper's export declarations have been filed with the appropriate district director of Customs.

When a democratic national election was held in February 1990 in Nicaragua, thus effectively ending the unusual and extraordinary threat to the national security and foreign policy of the U.S. posed by the previous Nicaraguan government, the President terminated the national emergency by E.O. 12707 dated March 13, 1990.

By letter dated August 29, 1990, the Department of State informed Customs that the need to continue the national emergency declared on May 1, 1985, had ended, and recommended that Nicaragua be removed from the list of countries in § 4.75(c) for which complete foreign manifests and export declarations were required.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

Because Nicaragua no longer poses immediate potential export control risks to the U.S., it would be contrary to the public interest to delay implementation of the change by seeking comments. Therefore, it has been determined that good cause exists for dispensing with notice and public procedure pursuant to 5 U.S.C. 553(b)(B) and, for the same reason, under 5 U.S.C. 553(d)(3), a delayed effective date is not required.

INAPPLICABILITY OF EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

Because this document will not result in a "major rule" as defined in E.O. 12291, Customs has not prepared a regulatory impact analysis. Nor is this document subject to the regulatory analysis or other requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). That Act does not apply to any regulation, such as this, for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551, *et seq.*) or any other statute.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs inspection and duties, Harbors, Vessels.

AMENDMENT TO THE REGULATIONS

For the reasons set forth in the preamble, Part 4, Customs Regulations (19 CFR 4) is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 2103, and 46 U.S.C. App. 3:

* * * * * * *

§ 4.75 also issued under 46 U.S.C. App. 91

* * * * * * *

2. Section 4.75(c), Customs Regulations (19 CFR 4.75(c)), is amended by removing "Nicaragua" from the list of countries set forth.

CAROL HALLETT,
Commissioner of Customs.

Approved: July 9, 1991.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 15, 1991 (56 FR 32084)]

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19 CFR Parts 122 and 178

(T.D. 91-61)

DOCUMENTS REQUIRED ABOARD PRIVATE AIRCRAFT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations, Part 122, to provide that the documents to be aboard private aircraft upon arrival in the U.S., and to be presented for inspection at such time when requested by a Customs officer, must include a valid pilot certificate/license, medical certificate, authorization, or license, and for U.S.-registered aircraft arriving from a foreign place, a valid certificate of registration which would not include a so-called "pink slip", a "pink slip" being nothing more than a duplicate copy of the application form (FAA Form AC 8050-1) for a certificate of registration. The penalty provisions of Part 122 are also amended to make express reference to these documentary requirements. The purpose of this rule is to achieve greater enforcement capability in processing private aircraft arriving from foreign, and to combat the continuing problem of drug smuggling by air.

EFFECTIVE DATE: August 14, 1991.

FOR FURTHER INFORMATION CONTACT:

Phyllis Isom, Office of Passenger Enforcement and Facilitation, (202)-566-5607.
Per Jensen, Office of Aviation Operations, (202)-535-9051.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As amended by Pub. L. 99-570, on October 27, 1986, 19 U.S.C. 1433 provides, in paragraph (d), that an "aircraft pilot shall present to

Customs officers such documents, papers, or manifests as the Secretary shall by regulation prescribe. Heretofore, however, the documents required in § 122.27, Customs Regulations (19 CFR 122.27), with reference to private aircraft arriving from foreign, have essentially pertained only to baggage declarations for crewmembers and passengers, and if found necessary, written declarations of articles acquired in foreign areas.

In order to give greater enforcement capability in processing private aircraft arriving fro abroad, and to combat the problem of drug smuggling by air, Customs published a notice of proposed rulemaking in the Federal Register on February 14, 1990 (55 FR 5225), soliciting public comment on a proposed amendment to § 122.27, to require that the documents to be aboard an aircraft upon arrival from foreign, and to be presented at such time for inspection when requested by a Customs officer, include a valid pilot certificate, flight instructor certificate, medical certificate, authorization or license, and for U.S.registered aircraft, a valid certificate of registration. In this latter regard, 49 U.S.C. App. 1401(g) also requires that "[t]he operator of an aircraft shall make available for inspection an aircraft's certificate of registration upon request by a Federal, State, or local law enforcement officer." A certificate of registration would not include a so-called "pink slip" (FAA Form AC 8050-1), a "pink slip" being nothing more than a duplicate copy of the application for a certificate of registration.

Furthermore, inasmuch as an essential part of the inspection process is document review, to help insure compliance with the proposed document requirements, the penalty provisions set forth in Subpart Q of Part 122, specifically § 122.161 (19 CFR 122.161), which include seizure and forfeiture of the aircraft, were also proposed to be amended so as to explicitly apply to private aircraft which do not have aboard a valid certificate of registration upon arrival.

Eighteen comments were received in response to the notice of proposed rulemaking. An analysis of these comments is set forth below.

ANALYSIS OF COMMENTS

Comment:

Many of the commenters indicated that the proposed documentary requirements would unduly burden the legitimate flyer. They believed that the proposed rule would not deter the smuggler, that the criminal would ignore the rule or forge the documents. Along these lines, one commenter observed that drug smugglers did not stop for Customs, and that Customs should specifically target the smuggler.

Response:

Section 122.27 does not impose any additional burden upon flyers beyond that which FAA already requires at the present time. While it is true that the documents in question could potentially be forged, the requirement that they be presented for inspection offers Customs the opportunity to establish the legitimacy of the pilot and the aircraft.

Comment:

One commenter suggested that theft of pilot documents was a common occurrence when pilots were in a foreign country, and that the proposed amendment of § 122.161 contained sanctions which were too drastic for these instances.

Response:

The sanctions available for failure to produce the required documents upon request fall within the purview of 19 U.S.C. 1436. Customs administrative procedures provide for unexpected and emergency situations to be taken into account in mitigating penalties and assessing the specific penalty appropriate to the circumstances.

Comment:

Numerous commenters stated that the proposed rule was a duplication of FAA's responsibilities, and that Customs should not be involved in the area of aircraft and pilot documentation. One such commenter indicated that the proposed amendment was a strategic attempt by Customs to amass excessive enforcement power.

Response:

Customs enforces the laws of any other agencies, and having an enforcement presence at points of arrival in the U.S., Customs is, accordingly, in a position to effectively enforce FAA and other agency regulations. In addition to this, Customs itself has been given direct enforcement authority in this area (19 U.S.C. 1433(d)). By handling the failure to produce the relevant documentation under Customs authority, the administrative burden on the Government should be reduced.

Comment:

Several commenters stated that the effect of not accepting a pink slip as a valid registration would be to virtually immobilize the aircraft.

Response:

A pink slip is not considered a valid registration by the FAA. Customs understands that the FAA is currently modernizing its processing procedures with respect to the issuance of aircraft registrations and pilot certificates.

Comment:

A number of commenters indicated that Customs should not be involved with the pilot's medical certificate.

Response:

Customs position is to use the existing documents, as required by the FAA, which identify a pilot as eligible to fly. The medical certificate is a critical component of this documentation.

Comment:

One commenter asked that Customs treat private aircraft the same as vehicular traffic in Michigan and Montana.

Response:

Customs has long maintained that different modes of transport pose different smuggling threats and enforcement problems. These threats change frequently, and Customs attempts to address them with flexibility and foresight. Customs regards vehicular traffic arriving from Canada, and private aircraft arriving from areas south of the U.S., as significantly different and warranting different degrees of attention.

Comment:

One commenter advocated that the term "commander" in proposed § 122.27(c)(1) be replaced with "certificated aircrew", in order to require that all persons acting as crewmembers aboard a private aircraft arriving from foreign such as the copilot and navigator, be subject to the same requirement for presentation of the specified documentation.

Response:

Customs finds merit in this request and will study the possibility of extending the rule to "certificated aircrew". Customs will also study the possibility of expanding the scope of § 122.27(c)(2) to include "private aircraft" as defined in § 122.23(a) (19 CFR 122.23(a)), which covers certain aircraft carrying passengers or cargo for hire. Any decision to further expand the scope of § 122.27(C)would, however, be the subject of a separate document.

Conclusion

After careful consideration of the comments received and further review of the matter, it has been determined that the amendments with the modifications hereinafter discussed should be adopted. In this latter regard, the term "pilot license" appearing in the headings of § 122.27(C) and (c) (1) is changed to "pilot certificate/license", in order to accord with FAA regulations and to avoid confusion among the U.S. pilot community, where "pilot certificate" is generally used to refer to a license. To conform with this, the term "pilot certificate" in § 122.27(c) (1) is likewise changed accordingly. In addition, § 122.27(c) (1) is revised by deleting the requirement for a "flight certificate". The presentation of a flight certificate is considered unnecessary since the "pilot certificate/license" will always be required.

Executive Order 12291

The document does not meet the criteria for a "major rule" as defined in § (1) (b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

Under the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments will not have a significant eco-

nomic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information contained in this final regulation is in § 122.27. The collection of information contained in this regulation has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 1515-0175. The estimated average burden associated with this collection of information is .0166 hour per respondent or recordkeeper, depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Paperwork Management Branch, Washington, D.C. 20229, or the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 122

Air transportation, Airports, Airport security

19 CFR Part 178

Collection of information, Paperwork requirements

AMENDMENTS TO THE REGULATIONS

For the reasons set forth in the preamble, Parts 122 and 178, Customs Regulations (19 CFR Parts 122, 178), are amended as set forth below.

PART 122 – AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644, 49 U.S.C. App. 1509. * * *

2. Section 122.27 is amended by adding a new paragraph (c) to read as follows:

§ 122.27 Documents required.

* * * * * * *

(c) *Pilot certificate/license, certificate of registration.*

(1) *Pilot certificate/license.* A commander of a private aircraft arriving in the U.S. must present for inspection a valid pilot certificate/ license, medical certificate, authorization, or license held by that person, when presentation for inspection is requested by a Customs officer.

(2) *Certificate of registration.* A valid certificate of registration for private aircraft Which are U.S.-registered must also be presented upon arrival in the U.S., when presentation for inspection is requested by a Customs officer. A so-called "pink slip" is a duplicate Copy of the Aircraft Registration Application (FAA Form AC 8050-1), and does not constitute a valid certificate of registration authorizing travel internationally.

3. Section 122.161 is amended to read as follows:

§ 122.161 In general.

Except as provided in § 122.14, any person who violates any Customs requirements stated in this part, or any regulation that applies to aircraft under § 122.2, is, in addition to any other applicable penalty, subject to a civil penalty of $5,000 as provided by 49 U.S.C. App. 1474, except for overages, and failure to manifest narcotics or marihuana, in which cases the penalties set forth in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584) apply, or for failure to report arrival or to present the documents required by § 122.27(C) of this part in which cases the penalties set forth in § 436, Tariff Act of 1930, as amended (19 U.S.C. 1436) apply, and any aircraft used in connection with any such violation shall be subject to seizure and forfeiture, as provided for in the Customs laws. A penalty or forfeiture may be mitigated under Part 171 of this chapter.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

§ 178.2 [Amended]

2. Section 178.2 is amended by inserting the following in the appropriate numerical sequence according to the section number under the columns indicated:

19 CFR Section	Description	OMB Control No.
* * *	* * *	*
§ 122.27	Documents required aboard private aircraft.	1515-0175
* * *	* * *	*

CAROL HALLETT,
Commissioner of Customs.

Approved: July 9, 1991.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 15, 1991 (56 FR 32085)]

U.S. Customs Service

General Notice

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 10, 1991.

The following document of the United States Customs Service, Office of Commercial Operations, has been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(O.C.O.D. 91-2)

The following are questions and answers that address issues that have arisen in connection with electronic entry filing. These questions and answers were developed by a multidiscipline task force within Customs assembled by the Pacific Region with participation by Headquarter's personnel from the Office of Trade Operations and the Office of Automated Commercial Systems. These questions and answers will help to establish uniform policy by providing valuable direction to field officers. They should be widely distributed and should be made available to the trade community as part of our efforts to promote paperless entry filing. Additional questions and answers my be circulated as new issues become the focus of attention.

QUESTIONS AND ANSWERS ON CUSTOMS REGULATIONS AMENDMENTS REGARDING ELECTRONIC ENTRY FILING

1. Q. What is meant by "reasonable time" for document production? (143.38)

   A. The time frames that prevail in the paper environment will remain unchanged. Normally up to 30 days, although shorter periods may be appropriate in specific cases.

2. Q. How does Customs reconcile "on demand" (113.62(j (3)) with "reasonable time"? (143.38)

   A. 19 CFR 113.62(j)(3) establishes a condition in the Customs entry bond that requires the qualified principal to produce documents and/or data "on demand". The "reasonable time" provision (143.38) establishes the time frame within which the production should occur. The Customs demand triggers the bond obligation, while the "reasonable time" provision determines when production should occur. The demand will specify the (reasonable) time for compliance.

3. Q. What is meant by "reasonable notice"? (143.38)

   A. The request for documents will be made to the responsible party and normally in writing and may be made anytime within the regulatory retention period (5 years). (143.37(a)(1–2))

4. Q. Will filers have to produce entry summary documents, ie., CF 7501, CF 3461?

   A. In most cases, no, because customs will capture that data from their internal eletronic records. Under normal circumstances, only those documents that support the transaction, such as the invoice or packing list will be requested and then ohly within the guidelines to be established and disseminated by Customs Headquarters.

   In unusual cases, a district director may request production of the entry documents, but again, only within the guidelines to be established and disseminated by Customs Headquarters.

5. Q. What will Customs do with documents after requirements for production are fulfilled?

   A. Customs will decide on a case-by-case basis if retention is necessary, but the documents would not be returned to the filer. Customs will return a receipt for documents received if requested to do so.

6. Q. Is ACH a requirement for paperless entry summary?

   A. No, ABI statement processing only is required. (143.33)

7. Q. How do Census errors affect paperless entry summary?

   A. The filer must receive an error free message to obtain paperless status. (143.35)

8. Q. Must a filer produce summary supporting documents when a paperless entry is protested?

   A. Yes, but only those documents necessary to substantiate the claim, e.g., invoice, Form A.

9. Q. Must a filer produce summary supporting documents when a drawback is filed?

   A. To expedite processing of any drawback claim Customs encourages the filing of an import invoice.

10. Q. What is a pre-approval program? (143.36(c)(3)

    A. Examples are pre-classification, binding rulings and line release. Customs envisions expanded pre-shipment advice programs in the future. (143.32(m))

11. Q. What will be the consequences if the filer is unable to produce requested entry summary supporting documents?

    A. Brokers unable to produce supporting documents may be subject to penalties pursuant to 19 CFR 111.91; importers unable to produce necessary documents may be subject to 19 CFR 113.62(k). Other consequences may also follow. For instance, if a third party files a drawback claim or protest but the importer is unable to produce necessary documents, the portion of the protest or drawback claim relating to that entry summary may be denied.

12. Q. What if an authorized third party files a drawback claim after the required 5 year retention period for entry summary records, and the filer is unable to produce entry support documents?

    A. There would be no penalties in such a case. However, the portion of the drawback claim relating to that entry summary could be denied.

13. Q. What provisions do the amended regulations make for centralized records retention?

    A. Two provisions in the amended regulations allow centralized storage of records upon notification to Customs. Section 111.23(a) provides for centralization of accounting and financial records. Section 143.37(c) provides for centralized storage of electronic data and those supporting records described in section 162.1a(a). Note that 143.37(c) applies only to the records of an electronic (i.e., ABI) filer, including their hard copy records and records for non-ABI entries.

14. Q. How will the new regulations apply to system failures?

    A. We see no change in existing practice as a result of the new regulations.

15. Q. Does the posted bulletin still constitute the legal evidence of liquidation in the case of electronic entry summaries?

    A. Yes. (159.9(c))

16. Q. Do the new regulations, 143.35, prohibit substitution of importers bond as importer of record on the entry summary?

    A. No. This is still provided for under 142.4(b)(2).

17. Q. Will filers be required to show name and address on the CF 3461 ALT? (142.3(a)(6))

    A. The CF 3461 ALT does not contain name and address fields. Accordingly, Customs plans to require an appropriate identification number (IRS #, SSN, Customs Assigned #). However, this requirement for a number on the CF 3461 ALT will be postponed until an encrypted identification number can be supplied by ACS through ABI.

18. Q. Section 111.1(f), 142.3 and 162.1a(a) CR require filers and importers to retain various electronic records for 5 years. Can filers/importers reduce these records to electronic, microfiche, or other media to reduce the storage burden?

    A. Generally, the documentation described in the referenced sections of the regulations, which support electronic immediate delivery, entry, and entry summary, must be retained in the condition in which they are received by the filer and/or importer; i.e., original documents or stored data transmissions for AII or EDIFACT. Filers/importers may, however, request permission to store the documentation by other means using media such as the mentioned in the question or optical disks. Requests for approval of alternate storage methods must be addressed, in writing, to the Assistant Commissioner, Comercial Operations. The request must describe the proposed system in detail, and will be approved or denied through written response. Storage requirements for paper immediate delivery applications, entries, and entry summaries are unchanged.

19. Q. Section 143.37(a) states, "all records received or generated by the broker mus be retained for a period of at least 5 years * * *". Does this mean that an ABI filer must keep all ABI output transmitted from Customs?

    A. No, it was not Customs' intent under 143.37(a) to *require* filers to retain ABI output from Customs. ABI results are retained electronically within the ACS system and are retrievable by Customs personnel. However, in case of disputes ABI filers would be required to provide acceptable records to the contrary on a case-by-case basis in defense of their argument.

20. Q. Part 143.32(e) defines the term "certification" and states that a certification must be transmitted as part of the electronic entry, I.D., or entry summary input. What is the practical effect of such certification?

    A. In the electronic environment, no signatures are possible, so the transmission of an additional character serves to "sign" the electronic entry or entry summary. Until such certification is received for a given electronic entry, CR 143.34, or entry summary, CR 143.35, ABI will withhold the disposition notification on that entry from the filer. Thus, in order to receive either a paperless release of cargo (or to learn that a CF 3461 must be submitted for inspector review), or to receive a paperless entry summary notification, the filer transmits a certification for the entry or entry summary.

21. Q. If a broker receives an electronic message (e.g., invoice) from a client from which they prepare and file an ABI message with Customs, which electronic message/s must the broker/filer retain?

    A. Both, though Customs interest will be primarily in the source message (i.e., invoice) from the client. Customs will retain the ABI essage received from the broker, and will not again require it of the broker except in unusual cases as determined by the district director.

22. Q. Can a electronic message (i.e., invoice) supporting electronic filing with Customs be converted to paper form by a filer or importer for retention purposes?

    A. Yes, electronic messages may be converted to paper form with the written permission of the Assistant Commissioner, Commercial Opeiations. (143.37(d))

23. Q. Can an ABI filer store records and/or data locally (i.e., within the filing district) (111.23 (a)) for a time, later transferring those records to a centralized filing location?

    A. Yes, as long as the transfers occur at a pre-stated time (e.g., 1 year after liquidation) specifically declared in the required notice to the Assistant Commissioner, Commercial Operations (143.37(c)). That notice, under any circumstances, must enable Customs to know the precise location of a given record or data at any time.

FOR ADDITIONAL INFORMATION CONTACT:

Office of Trade Operations, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, DC 20229, (202) 566-6006.

U.S. Court of Appeals for the Federal Curcuit

TORRINGTON CO., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 91-1020

(Decided July 3, 1991)

Terence P. Stewart, of Stewart and Stewart, Washington, D.C., argued for plaintiff-appellant. With him on the brief were *Eugene L. Stewart* and *Wesley K. Caine.*

Jeanne E. Davidson, of the Civil Division, Department of Justice, Washington, D.C., argued for defendant-appellee. With her on the brief were *Stuart M. Gerson,* Assistant Attorney General, and *David M. Cohen,* Director. Of counsel were *Stephen J. Powell* and *John D. McInerney,* of the Office of the Chief Counsel for Import Administration, Department of Commerce.

J. Unger Donald, of Barnes, Richardson & Colburn, Chicago, Illinois, represented *amici curiae* NTN Corporation, NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., and NTN Toyo Bearing Co., Ltd. Of counsel were *Robert E. Burke, Kazumune V. Kano,* and *Diane A. MacDonald.*

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before RICH, ARCHER, and LOURIE, *Circuit Judges.*

LOURIE, *Circuit Judge.*

This is an appeal from the August 3, 1990, judgment of the Court of International Trade which held that the Department of Commerce has the authority to modify a petition's description of "class or kind" in an antidumping investigation when it finds that the petition has described more than one class or kind of merchandise, and that its determination was supported by substantial evidence. *Torrington Co. v. United States,* 745 F. Supp. 718 (Ct. Int'l Trade 1990). We affirm.

BACKGROUND

On March 31, 1988, the Torrington Company filed a petition with the Department of Commerce requesting that antidumping duties be imposed on imports of antifriction bearings from a number of countries. The petition stated the class of imported merchandise to be "all ground antifriction bearings and all parts thereof both finished and unfinished with the exception of tapered roller bearings."

Based on the petition, Commerce initiated an antidumping investigation and determined that there were five classes of bearings. The classes were: (1) ball bearings, (2) spherical roller bearings, (3) cylindrical roller bearings, (4) needle roller bearings, and (5) plain bearings. Commerce

then notified Torrington that more evidence as to the several classes was required. Torrington submitted more evidence, but this evidence was deemed by Commerce to be inadequate as to certain classes. Accordingly, Commerce rescinded the investigations of classes 3, 4, and 5. As to the other classes, Commerce concluded that dumping was occurring and issued antidumping duty orders.

Torrington appealed Commerce's determination to the Court of International Trade. The court held that Commerce did not err in determining that there were five classes of bearings as opposed to the one class alleged in Torrington's petition, and that this determination was supported by substantial evidence. This appeal followed.

DISCUSSION

The principal issues here are (1) whether Commerce has the discretionary authority to determine the number of classes in an antidumping investigation, and (2) whether Commerce's determination that there were five classes of bearings was supported by substantial evidence. The first issue is a legal one which we review *de novo, Matsushita Elec. Indus. Co. v. United States,* 929 F.2d 1577, 1578 (Fed. Cir. 1991); in the second, we review the evidence of record to determine whether substantial evidence supports Commerce's determination, *American Permac, Inc. v. United States,* 831 F.2d 269, 273, 6 Fed. Cir. (T) 6, 10–11 (1987), *cert. dismissed,* 485 U.S. 901 (1988).

Appellant argues that the court improperly upheld an erroneously narrow construction by Commerce of the term "class," that it improperly upheld a determination which was unsupported by substantial evidence, that it erred by upholding a determination that was inconsistent with precedent, and that the court erred by upholding Commerce's "class or kind" determination because it was inconsistent with the class description in the antidumping petition.

Because the trial court performed a thorough and correct analysis of the facts and arguments raised, we affirm its decision and adopt its opinion as our own. Moreover, we note that Commerce is charged with administering the involved sections of the antidumping duty laws. We will not disturb its interpretation unless it is unreasonable, and we conclude that it is not. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–44 (1984). We have considered all of appellant's arguments and find no reason to reverse the Court of International Trade.

CONCLUSION

Commerce has the discretionary authority to define the classes of merchandise that are the subject of an antidumping investigation. Its determination was supported by substantial evidence. The judgment of the court is therefore

AFFIRMED.

TORRINGTON CO., PLAINTIFF-APPELLANT *v.* UNITED STATES, FAG KUGELFISCHER GEORG SCHAEFER KGAA, FAG CUSCINETTI, S.P.A. AND FAG BEARINGS CORP.; KIPPON SEIKO, K.K. AND NSK CORP.; CATERPILLAR, INC.; KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A.; HOESCH ROTHE ERDE SCHMIEDAG AG AND ROTEK INC.; AND NTN CORP., NTN BEARING CORP OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP. AND NTN TOYO BEARING CO., LTD.; SKF USA, INC., AB SKF, SKF GMBH AND SKF GLEITLAGER GMBH, SKF FRANCE, RIV-SKF INDUSTRIES, S.P.A., SKF SVERIGE AB AND SKF (U.K.) LTD.; ICSA INDUSTRIA CUSCINNETI S.P.A., DEFENDANTS-APPELLEES

Appeal No. 91-1084

(Decided July 3, 1991)

Terence P. Stewart, Stewart & Stewart, of Washington, D.C., argued for plaintiff-appellant. With him on the brief were *Eugene L. Stewart* and *James R. Cannon, Jr.*

Frances Marshall, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendants-appellees, The United States. With her on the brief were *Stephen A. McLaughlin*, Office of the General Counsel and *James A. Toupin*, Assistant General Counsel. *Herbert C. Shelley*, Howrey & Simon, of Washington, D.C., argued for defendants-appellees, SKF USA, et al. With him on the brief was *Alice A. Kipel*.

Louis S. Mastriani and *Barbara A. Murphy*, Adduci, Mastriani, Meeks & Schill, of Washington, D.C., were on the brief for intervenors-appellees, FAG Kugelfischer Georg Schaefer KGaA, FAG Cuscinetti SpA and FAG Bearings Corporation.

Peter O. Suchman and *Neil R. Ellis*, Powell, Goldstein, Frazer & Murphy, of Washington, D.C., were on the brief for defendants-appellees, Caterpillar, Inc.

Walter A. Smith. Jr., *Lewis E. Leibowitz* and *David W. Phillips*, Hogan and Hartson, of Washington, D.C., were on the brief for defendants-appellees, Hoesch Rothe Erde Schmiedag AG and Rotek, Inc.

Donald J. Unger, *Robert E. Burke*, *Brian F. Walsh* and *Jesse M. Gerson*, of Chicago, Illinois, were on the brief for defendants-appellees, NTN Corporation, NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp. and NTN Toyo Bearing Co., Ltd.

Robert A. Lipstein and *Nathan V. Holt*, Coudert Brothers, of Washington, D.C., represented the defendants-appellees, Nippon Seiko.

Pierre F. De Ravel D'Esclapon and *Thomas R. Trowbridge, III*, of New York, New York, represented the defendants-appellees, ISCA Industries Cuscinetti S.p.A.

Appealed from: U.S. Court of International Trade.

Judge TSOUCALAS.

Before RICH, ARCHER, and LOURIE, *Circuit Judges*.

LOURIE, *Circuit Judge*.

This is an appeal from the September 11, 1990, judgment of the Court of International Trade which held that the International Trade Commission has the authority to determine which domestic products are "like products", even if the determination differs from the like product description in the petition to the Commission, and that the determination was supported by substantial evidence. *Torrington Co. v. United States*, 747 F. Supp. 744 (Ct. Int'l Trade 1990). We affirm.

BACKGROUND

On March 31, 1988, the Torrington Company filed an antidumping and countervailing duty petition with the International Trade Commission on behalf of the domestic industry that produces antifriction bearings. The petition described one type of product, antifriction bearings.

Based on the petition, the Commission initiated an investigation. In May 1989, the Commission issued final injury determinations for six types of products, *viz.*, (1) ball bearings, (2) spherical roller bearings, (3) cylindrical roller bearings, (4) needle roller bearings, (5) plain bearings, and (6) slewing rings. Subsequently, the Commission rendered affirmative injury determinations only for types 1, 3, and 5.

Torrington appealed the Commission's determination that there were six "like products" to the Court of International Trade. The court did not review the injury determinations, nor do we. It held that the Commission did not err in determining that there were six like products as opposed to the one product alleged in Torrington's petition, and that this determination was supported by substantial evidence. This appeal followed.

DISCUSSION

The principal issues here are (1) whether the Commission has the discretionary authority to determine the number of like products in an antidumping and countervailing duty investigation, and (2) whether the Commission's determination that there were six like products was supported by substantial evidence. The first issue is a legal one which we review *de novo, Matsushita Elec. Indus. Co. v. United States,* 929 F.2d 1577, 1578 (Fed. Cir. 1991); in the second, we review the evidence of record to determine whether substantial evidence supports the Commission's determination, *American Permac, Inc. v. United States,* 831 F.2d 269, 273, 6 Fed. Cir. (T) 6, 10–11 (1987), *cert. dismissed,* 485 U.S. 901 (1988).

Appellant argues that the Commission's determination that there were six like products was in error because it relied upon an erroneous determination of the Department of Commerce that there were five classes of bearings, that the Commission abused its discretion, and that its determination was unsupported by substantial evidence.

Because the trial court performed a thorough and correct analysis of the facts and arguments raised, we affirm its decision and adopt its opinion as our own. Moreover, we note that the Commission is charged with administering the involved sections of the antidumping and countervailing duty laws. We will not disturb its interpretation unless it is unreasonable, and we conclude that it is not. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–44 (1984). We have considered all of appellant's arguments and find no reason to reverse the Court of International Trade.

CONCLUSION

The International Trade Commission has the discretionary authority to define the like products that are the subject of an antidumping and countervailing duty investigation. Its determination was supported by substantial evidence. The judgment of the court is therefore

AFFIRMED.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Judges

Gregory W. Carman*
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

Morgan Ford

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

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* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.

Decisions of the United States Court of International Trade

(Slip Op. 91-53)

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, LOCAL 610, MICHAEL MURPHY, JAMES CAPPETTA AND EDWARD KRISTOFIK, PLAINTIFFS *v.* LYNN MARTIN, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, DEFENDANT

Court No. 86-11-01409

[Judgment for plaintiffs.]

(Decided June 27, 1991)

United Elec., Radio and Mach. Workers of America, (Robin Alexander), Neighborhood Legal Services Ass'n, (John Stember) for the plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Velta A. Melnbrencis), Gary Bernstecker,* U.S. Department of Labor, of counsel, for the defendant.

MEMORANDUM AND ORDER

RESTANI, *Judge:* Defendant has now submitted its fifth determination.[1] Plaintiffs, former employees of the Swissvale, Pennsylvania plant of Union Switch and Signal ("Company" or "Union Switch"), a company producing railway systems, claim that they lost their jobs because the Company substituted foreign imports for products formerly produced at Swissvale.[2] Initially, the Department of Labor ("Labor" or "Secretary") denied certification of any Swissvale workers. On redetermination Labor, after finding that it had conducted an inadequate investigation, certified three sections of the plant, comprising section 110 (sheet metal fabrication), section 390 (dipping of sheet metal to prevent rusting), and section 222 (part of Unit Shop II which wired office control panels). This included sixty (60) of about five hundred (500) workers.

Petitioners objected to the determination, pointing out that the Company had continually supplied false and misleading information to Labor, and that the imported Canadian panels adversely affected employment throughout the plant. Moreover, plaintiffs claimed that other imports, such as Korean relay frames and Italian train-stop kits, caused layoffs.

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[1] For a more detailed history of this case, *see United Elec., Radio & Mach. Workers of Am. v. United States,* 11 CIT 590, 669 F. Supp. 467 (1987) (*United Electrical I*), *United Elec., Radio & Mach. Workers of Am. v. Brock,* 14 CIT ___, 731 F. Supp. 1082 (1990) (*United Electrical II*) and *United Elec., Radio & Mach Workers of Am. v. Dole,* 14 CIT ___, slip op. 90-131 (December 13, 1990) (*United Electrical III*).

[2] Following a bitter strike, separations began in 1983 and continued until the plant shut down in 1987.

This investigation has been remanded previously due to admitted investigative inadequacies by Labor and other failures on the part of the Secretary found by the court. In *United Electrical II,* the court, finding that the congressional intent that workers laid-off due to imports receive benefits promptly had been frustrated, took the extraordinary step of insisting that, if Labor continued to deny certification to the entire plant, it locate specific documentary evidence refuting petitioners' claims or, if such evidence could no longer be obtained, then it must produce any Company official on whose testimony it relies to refute plaintiffs' claims at a hearing.

Labor obtained sworn statements from three Company officials which, it contended, supported its negative determination. Unable to locate a significant amount of documentary evidence, Labor conducted a hearing on May 23, 1990. Labor did not allow petitioners to present their own witnesses at the hearing. The court granted plaintiffs' request that Labor consider post-hearing statements by former Company employees and management personnel. Labor reaffirmed its negative determination.

In *United Electrical III,* the court found that the statements submitted by petitioners supported their claim for certification, and that those relied upon by Labor either supported certification, were irrelevant, or incompetent. The court found that Labor, for unacceptable reasons, had given no weight to the statements submitted by petitioners. The court ordered plaintiffs to submit *sworn* statements. If they continued to support certification of the Quality Assurance section ("QA") of the plant, then Labor was to certify that section. Labor was then to decide what other sections of the plant were to be certified due to imports of Canadian office control panels. The court stated that "[i]f distinctions cannot be drawn because of loss of records and witnesses cannot remember exact times of layoffs in various sections, the entire plant must be certified because Labor is responsible for the delays and loss of records." *United Electrical III,* slip op. at 25–26.

If the whole plant could not be certified due to imported panels, Labor was to examine the effect of imported train-stop kits. The court instructed Labor to determine "if increased imports of competing train-stops to the American market in general, as well as to Union Switch, contributed importantly to employment declines at Swissvale." *Id.* at 26.

Plaintiffs submitted sworn affidavits from Messrs. Bruce Wilson, James Fonzi and John Fabrizzi, reiterating their statements submitted prior to the last determination.

I. *Office Control Panels:*

In its determination of January 13, 1991, Labor states that importation of Canadian office control panels could not form a basis for certification beyond the three sections of the plant already certified. The Secretary pointed out that the record indicates that employment in QA dropped in 1984, remained relatively flat in 1985, during the period of

investigation ("POI"), and dropped again in 1986. Labor relates these figures to the statements of petitioner's affiants, which indicate that the imported panels originally arrived at Swissvale in relatively unfinished condition and required much work and added value. By the beginning of 1985, however, they came in relatively complete condition, with little or no work left to be done. This, the Secretary claims, indicates that by 1985, imported panels had no effect on employment in QA.[3] Supplemental Administrative Record II ("Supp. Ad. R. II") at 18.[4] This is an enormous leap of logic. Furthermore, the court cannot help but notice that Labor seems to have taken a 180 degree turn in its reasoning for why panel imports cannot form a basis for further certification. In his July 13, 1988 memorandum to the certifying officer, the director of Labor's Office of Trade Adjustment Assistance stated that "[t]he certification of panel imports was limited to the three departments because of the positive employment effect of panel imports on other departments." C-189.[5] The director seemed to be of the same opinion after the third remand investigation, Supp. Ad. R. I at 62, and the certifying officer gave as a reason for his negative determination that "I am persuaded that significant additional work had to be performed on the imported panels." *Id.* at 68. Now, faced with the court's order that it consider the affidavits submitted by petitioners which claim that the panels came in finished condition, Labor claims that they do not form a basis for certification *because* they came in finished. This "heads I win tails you lose" reasoning is unacceptable.[6]

As for the figures regarding employment in QA, the court believes that it is simply to late to use this as a basis for refusing to certify. First, these records are of dubious accuracy. Mr. Daniel Edwards, who served as plant manager at Swissvale just following the POI, said that, while he served in this position, "employees were transferred all around the plant. Because much of the clerical staff was laid off, Union Switch did not prepare normal transfer paperwork." C-123.[7] Labor attempts to support its conclusions by pointing to employment records collected during the initial investigation which indicate that after an initial drop in employment in 1984, employment rose slightly in 1985 before dropping again in 1986 followed by the plant shutdown in 1987. Initial Administrative Record at 44–46. Labor argues that this shows that "the

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[3] Or anywhere else in the plant, for that matter, notwithstanding the three certified sections.

[4] "Supp. Ad. R. II" refers to the administrative record compiled on the fourth remand investigation.

[5] The prefix "C-" refers to the administrative record compiled during the second remand investigation.

[6] Along these lines, the court notes that Labor's present position seems to be that plaintiffs filed their petition at the worst possible time, too late to cover any layoffs due to panel imports, Supp. Ad. R. II at 17–18, and too early to cover any layoffs due to imported Korean relay frames. *United Electrical II*, 731 F. Supp. at 1087–1089.

[7] The court notes that in *In re Robert H. Keeler*, No. TRA-87-6-0-1669 (Nov. 4, 1987), the Pennsylvania Unemployment Compensation Board of Review found that, during the POI, "[b]ecause of the constant turnover and reassignments, and because of the knowledge that the layoffs would continue through the date of the plant shutdown, transfer papers were not made out and the payroll records were not changed."

entire plant did not meet criterion (3) of 19 U.S.C. § 2272(a)." [8] Defendant's Brief ("D. Brief") at 55. This, however, is not an attack on criterion (3), but rather on criterion (1). Labor has never disputed that petitioners have met criteria (1) and (2). *United Electrical II,* 731 F. Supp. at 1084. Finally, the court has already noted that, against the background of this particular case,"[t]he fact that layoffs were recorded in QA in May 1986 supports the conclusion that they were threatened earlier." *United Electrical III,* slip op. at 25 n.16.

In any event, plaintiffs' affiants gave sworn testimony that, *by the beginning of 1986,* panel imports had "eliminated well over 20% of the jobs throughout the plant." Supp. Ad. R. II at 2, 4. Defendant argues that these employees, which comprised an inspector of QA and the manager of QA, never explained how they were "in a position to know how many jobs were eliminated throughout the plant as a result of panel imports." D. Brief at 46, 47. After the third remand investigation, however, the certifying officer based his negative determination on, *inter alia,* the fact that "Mr. [V. John] Poremba testified that there were no worker separations because of the imported Canadian panels. * * *"[9] Supp. Ad. R. I at 68. This despite the fact that he was no longer actively employed at Union Switch during the last half of the POI. *Id.* at 59. Plaintiff's affiant Mr. Bruce Wilson, the former inspector of QA and a Company employee for over 35 years who worked at Swissvale throughout the POI, displayed a thorough knowledge of how panel production affected sections throughout the plant at the original hearing held on April 16, 1987. Transcript at 35–36.

Labor also determined that panel imports could not form the basis for further certification because the purchase orders in the administrative record indicate that the dollar value of panel purchases by the Company declined during the POI, Supp. Ad. R. II at 18, and that therefore criterion (3), which requires that separations be caused by *increases* in imports, was not met. Throughout this litigation, petitioners have claimed that, after it was shown that the Company's claims that it was not importing were shown to be false, that it underreported its foreign purchases. Plaintiffs claim that

> [t]he company had at least three objective reasons to understate any reliance on imports: (a) Federal law imposed criminal and/or financial penalties if railway equipment sold to publicly funded mass transit systems, [Union Switch's] major customers, was not

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[8] According to section 222 of the 1974 Trade Act, in order to certify a group as eligible for adjustment assistance, the Secretary must determine:

(1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm has become totally or partially separated, or are threatened to become totally or partially separated,
(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a) (1988).

[9] In fact, Mr. Poremba never made such a categorical statement. *See* Transcript of the May, 23, 1990 hearing ("H-") at 65. Moreover, he emphatically vouched for the integrity of plaintiffs' affiants, including the inspector of QA. H-98-99.

> fully assembled in the US and comprised of at least 50% domestic content; (2) [Union Switch's] marketing strategy depended heavily on the high quality reputation associated with the "made in Swissvale" logo, which the company continued to affix on imported panels and other parts; and (3) the company was embittered towards the Union, Petitioners herein, as a result of a difficult strike.

Plaintiffs' Objections to Defendant's Decision ("P. Brief") at 16.

There is support for petitioners' allegations in the record. According to Mr. Edwards,

> [t]here are a number of reasons why Union Switch would have wanted to down-play and understate its use of imports. For many years the New York City subway system was Union Switch's biggest customer. An order from New York could account for as much as two months of the plant's yearly workload. In the years preceding shutdown, the United Electrical Workers Local 610, the union which represented hourly employees at Swissvale, mounted a campaign to try to stop outsourcing and job loss. Local 610 officials went to New York City and joined with other unions and claimed that Union Switch was outsourcing parts and that these imports were of inferior quality and created possible safety hazards. The campaign caused Union Switch some problems and increased animosity between the company and the union. The company received complaints and enquiries from the New York City subway system. Thus to maintain its image, keep its market share and placate its largest customer – who thought it was buying Swissvale made products – Union Switch had a good reason to understate or disclaim substantial reliance on imported parts.

C-122. The fact that the Company has been so unforthcoming about its import practices throughout this investigation, a fact that led the court to order extraordinary procedures in *United Electrical III,* leads the court to give credence to petitioners' allegations.[10] At this point, therefore, the court cannot view as reliable the data gleaned from the purchase orders in the record. Even if they are accurate, however, the Secretary concluded the overall market for railway systems was in decline. *See supra,* n.10. Therefore, a decline in the absolute dollar of foreign purchases does not indicate that there was not a *relative* increase. *Id.*

The most troubling aspect of the latest determination on remand regarding imported panels is that Labor has introduced a new, and not well explained, theory for its negative determination. The certifying officer contends that

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[10] The court cannot accept the Secretary's conclusion that the Company was unaware of its own import practices. The apparent fact that imports led to disaffection among both its workers and its customers renders such ignorance incredible. The court also notes that, according to Labor's own regulations, "'[i]ncreased imports' means that imports have increased either absolutely or *relative to domestic production* compared to a representative base period * * *" 29 C.F.R. § 90.3 (emphasis added). Because the Secretary certified three sections of the plant due to panel imports, Labor must have determined either that the Company continued to supply false data regarding panel imports, or that, due to difficult market conditions, Supp. Ad. R. II at 18, domestic production had declined to the point that panel imports had increased relatively despite an absolute decrease. In any case, it cannot be that panel imports had increased for some sections of the plant but not for others.

> [t]he Swissvale plant produced signalling systems and components of those systems. With respect to components, the courts, early in the administration of the worker adjustment assistance program, addressed the issue of components and finished articles. In *United Shoe Workers of America, AFL-CIO v. Bedell,* 506 F.2d 174, (D.C. Cir. 1974), the court held that imported finished women's shoes were not like or directly competitive with shoe components. * * *
>
> Accordingly, the panels imported from Canada are not like or directly competitive with the signalling systems of which they are a component.

Supp. Ad. R. II at 19. Presumably, then, criterion (3) would not be satisfied. *United Shoe,* however, is inapposite. That case dealt with domestic producers of components who claimed to have been injured by the importation into the U.S. market of a finished product by an unrelated importer. The court found that it was reasonable for Labor to determine that domestic component producers could not claim the right to trade adjustment assistance due to competition from imported finished products because, if the two products were like or directly competitive, then "manufacturers of nuts and bolts * * * [could] claim * * * relief on account of the importation of automobiles." *United Shoe,* 506 F.2d at 181 (*quoting* 101 Cong. Rec. 8162 (1955)).

The rationale of that case does not apply to the investigation at bar, however. This is not a case of producers of panels complaining about importation into the U.S. market of fully finished train systems. Rather, these are producers of fully finished systems, as well as the components therein, complaining of importation of components of those systems to their own plant. The workers produced exactly what was imported. This is not a situation where "the allegedly competing item has been processed into an entirely new article." *Id.*

United Shoe's progeny, cited by defendant in its brief, likewise do not support the Secretary's determination. In *Morristown Magnavox Former Emp. v. Marshall,* 671 F.2d 194 (6th Cir.), *cert. denied,* 459 U.S. 1041 (1982), Labor had determined that workers who produced television components at a plant which had shut down did not lose their jobs due to competition from imports of fully assembled Japanese television sets. The court based its affirmance on the Secretary's finding that fully assembled televisions were not "like or directly competitive" with the printed circuit boards, fly backs and deflection yokes produced by petitioners.[11] *See also Int'l Brotherhood of Elec. Workers v. Donovan,* 10 CIT 524, 642 F. Supp. 1183 (1986)(imported Japanese televisions were not like or directly competitive with picture tubes produced by petitioners). In the *Morristown* investigation, however, the Secretary apparently based his rationale on the fact that the company *"did not increase its reliance on imports of the components which had been produced by the petitioning workers."* 671 F.2d at 196 (*quoting* the Secretary's Brief at

[11] In *Morristown,* the Secretary also based his determination on a finding that the company's sales had in fact *increased* during the POI. The opposite is true in the investigation at bar.

15) (emphasis added by the *Morristown* court). In the investigation at bar, this is *exactly* what happened.

The court followed this line of reasoning in *Holloway v. Donovan*, 7 CIT 237, 585 F. Supp. 1427 (1984). In that case, the court upheld the Secretary's determination that imported automobiles were not like or directly competitive with the automotive parts produced by petitioners because "the components in question, automotive injection molded parts, are not interchangeable with or substitutable for the end product, a fully assembled automobile." *Id.* at 240–41, 585 F. Supp. at 1431. The court engaged in this analysis, however, only after it had already noted that "[t]he investigation revealed no shift in production between [petitioners'] plant and other domestic or foreign plants. * * *" *Id.* at 238, 585 F. Supp. at 1429. Similarly, in *International Union v. Donovan*, 8 CIT 13, 592 F. Supp. 673 (1984), the court upheld the Secretary's determination that fully assembled automobiles imported into the U.S. market were not like or directly competitive with the automotive parts produced by petitioners. *Id.* at 20, 592 F. Supp. at 679. The court used a different analysis, however, in determining whether to uphold the Secretary's negative determination regarding production of parts which the company itself had transferred overseas. The court upheld the Secretary's determination, not because such parts were not "like or directly competitive" with petitioners' product, but because such imports were *de minimis*. *Id.* at 18–19, 592 F. Supp. at 678. To reiterate, panel workers in the investigation at bar are not claiming to have been displaced by imports of fully assembled railway systems into the U.S. market. Rather, they claim that the Company transferred production, formerly performed by petitioners, to foreign producers. Therefore, Labor clearly misanalyzed the data.

The Secretary also cites *Mach. Printers and Engravers Ass'n of the United States v. Marshall*, 595 F.2d 860 (D.C. Cir. 1979)(per curiam). In that case, the court upheld Labor's denial of Trade Adjustment Assistance to workers who engraved patterns on metal or plastic rollers for use in printing patterns on fabrics. The workers claimed that they had lost their jobs due to imported fabric. This case is clearly inapposite. Not only is imported fabric not "like or directly competitive" with engravings, but engravings cannot even be said to be a "component" of fabric.

After citing *United Shoe*, the certifying officer states that "[i]t is the Department's policy to certify component workers if at least 25 percent of the activity of their department or their work is related to the production of the article adversely affected by the imported like or directly competitive article." Supp. Ad. R. II at 19–20. This simply does not make sense. The certifying officer had just finished stating that the imported panels were *not* "like or directly competitive" to Swissvale' product. Perhaps he meant that if 25 per cent of a component supplier's activity is eliminated or threatened with elimination by the importation of a finished product, then Labor *does* view the domestic and foreign articles as

"like or directly competitive." As explained *supra,* however, such is not the situation at bar.

Even if such an analysis were applicable to the investigation at bar, however, none of the previous determinations mentioned application of this standard. Nevertheless, Labor now states that it applied the 25 percent test in this investigation, and that the three certified sections passed. The other sections, presumably, did not. Supp. Ad. R. II at 19–20. Defendant argues that the record demonstrates that Labor made these calculations during the first remand investigation. D. Brief at 60. The part of the record cited, A-33-34,[12] does show certain calculations, but for only two of the three certified sections. More importantly, Labor clearly made these calculations using the wrong panel data, i.e., with a process sheet for a small B-30 panel instead of a much larger and more expensive office control panel. *See United Electrical II,* 731 F. Supp. at 1085. Most importantly, however, it is simply too late for Labor to explain its negative determination by means of some never before mentioned theory. Moreover, since, as explained *supra,* this is not the *United Shoe* situation, the 25 percent test is contrary to law because it appears that Congress

> intended that in most cases total or partial separation of a significant number or proportion of the workers should be found where the total or partial separation, or both, in a firm, or an appropriate subdivision thereof, is the equivalent to a total unemployment of 5 percent of the workers or 50 workers, whichever is less.

Report of the Senate Committee on Finance on the Trade Reform Act of 1974, S. Rep. No. 1298, 93rd Cong., 2d Sess. 133, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7275.

Since the three certified sections of the plant passed Labor's overly restrictive test notwithstanding the fact that the Secretary used time sheets for a much smaller panel than those the production of which had been moved abroad, there can be little doubt that Labor's decision to certify these sections was proper, even if arrived at erroneously. If, indeed, Labor made these calculations for other sections of the plant, they, too, might have passed the test had the Secretary used time sheets for an office control panel and had required an outcome of only 5 percent.

Throughout this litigation, petitioners have maintained that panel imports affected every section of the plant. Labor has disputed this but has not supported that conclusion properly. As the appropriate time sheets are no longer available, the truth will never be known, but petitioners must not be made to suffer because of the Secretary's investigative errors. In conclusion, the court is not merely reweighing the evidence relied on by the Secretary. The court finds that the Secretary's findings are not supported and can never be supported by substantial evidence.

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[12] The prefix "A-" refers to the administrative record compiled by Labor during the first remand investigation.

II. *Train-Stop Kits:*

Labor has ignored the court's instructions that it "determine if increased imports of competing train-stops to the American market in general, as well as to Union Switch, contributed importantly to employment declines at Swissvale." *United Electrical III,* slip op. at 26. Instead, it has adhered to its reasoning that the Italian train-stop was not like or directly competitive with the Company's product because

> [t]he train stop system produced at Swissvale could not be used to replace an imported train stop system that developed defects as the result of the normal wear and tear involved in operating the system. Similarly, the imported train stop system could not be used as replacements for systems components used in systems produced at Swissvale.

Supp. Ad. R. II at 22–23.

Even if accurate, this only demonstrates that the Italian system was not "like" the domestic product, not that it did not directly compete with Swissvale's product. As the court pointed out,

> [p]erfect substitutability under contract specifications is not necessary to a finding that products compete or that increased imports of such competing goods caused or threatened layoffs. If users specified a competing type of imported train-stop rather than a domestic type, thus significantly contributing to employment declines at Swissvale, certification should have occurred.

United Electrical III, slip op. at 17. Moreover, as plaintiffs point out, "Labor has issued numerous certifications for American autoworkers despite the fact that Toyota, Nissan and Honda windshields, transmissions and other parts are not interchangeable with parts for GM, Chrysler or Ford vehicles." P. Brief at 22 n.17.

Defendant now argues that the Italian system is newer and more technologically advanced and that to view the two systems as directly competitive "would render (1) a manual typewriter 'like or directly competitive with' an electronic typewriter with a text memory because both are allegedly substantially equivalent for commercial purposes and adapted to the same uses, *i.e.*, typing, and (2) a Cadillac automobile 'like or directly competitive with' an inexpensive imported sub-compact because both are adapted to the same use, *i.e.*, driving." D. Brief at 67–68. The record, however, indicates that the Italian system was in fact not newer, not more sophisticated, and did not even require different facilities or engineering expertise to produce. H-12-15.

III. *The Secretary Must Certify the Entire Plant:*

As the court previously noted,

> [a]t this point in time, it is highly unlikely that a true picture of the impact of imports on employment at Swissvale will ever be known. It may be that more workers will be certified as eligible than should have been if the proper documentary evidence was obtained and the proper avenue of investigation followed at the outset. But plaintiffs

may not be penalized because of Labor's initial errors and easy grasp of erroneous data indicating lack of eligibility.

United Electrical III, slip op. at 26–27.

The court believes that the only just action to take now is to certify the entire plant. This will likely involve more workers than would have been certified had Labor followed proper procedures initially, but it is much too late for any further remands to produce any more accurate results. Due to the Secretary's repeated failure to conduct an adequate investigation, the documentation which would have resolved the pending questions is no longer available, and memories are stale. Petitioners must not be penalized for this. Recognizing this, in *United Electrical III,* the court ordered the Secretary to certify the plant if petitioners submitted sworn affidavits which continued to support certification. Petitioners did so, but Labor failed to carry out the court's instructions.

The court has the power to order the Secretary to certify the entire plant, and does so. 19 U.S.C. § 2395(c) (1988). *See also United Electrical III,* slip op. at 24 n.14.

CONCLUSIONS

Throughout this investigation, Labor has relied on false data and has used protean reasoning to force its negative determination to fit whatever new facts come to light. No purpose would be served by yet another remand. Questions regarding this investigation will always remain. Nevertheless, "[a]ll things must end – even litigation." *Southern Rambler Sales. Inc. v. American Motors Corp.,* 375 F.2d 932, 938 (5th Cir.), *cert. denied,* 389 U.S. 832 (1967). The Secretary shall certify the entire plant as eligible for Trade Adjustment Assistance.

(Slip Op. 91-54)

ALBERT KAZANGIAN, PLAINTIFF *v.* NICHOLAS F. BRADY, ET AL., DEFENDANTS

Court No. 90-04-00206

[Motion to dismiss denied, stay of revocation decision lifted.]

Birol John Dogan for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Field Office, (*Bruce N. Stratvert*) United States Department of Justice, Civil Division, Commercial Litigation Branch, for defendants.

(Dated June 27, 1991)

MEMORANDUM AND ORDER

RESTANI, *Judge:* Mr. Albert Kazangian seeks relief from the decision of the Department of the Treasury to revoke his customs broker's license. Defendants now move for dismissal of plaintiff's complaint for lack of prosecution and failure to comply with the court's scheduling order. For

the reasons set forth below, the court denies defendants' motion, but orders stay of the decision to revoke lifted.

Background

Treasury brought charges against Mr. Kazangian for fraud against his clients, failure to maintain required records and powers of attorney, and failure to account for client funds. A hearing was held before an administrative law judge on March 16 and 17, 1989. On June 30, 1989, the judge recommended that Mr. Kazangian's broker's license be revoked.

On January 4, 1990, the Assistant Secretary of the Treasury adopted the recommendation and ordered the revocation of Mr. Kazangian's broker's license. This revocation has been stayed during the pendency of this action pursuant to 19 U.S.C. § 1641(e)(5) (1988), which provides, in relevant part, that "[t]he commencement of proceedings under [section 1641(e)] shall, unless specifically ordered by the court, operate as a stay of the decision of the Secretary.* * *"

At a CIT Rule 16 conference, held on January 15, 1991, the court allowed Mr. Kazangian until March 16, 1991, to file a motion for judgment on the administrative record under CIT Rule 56.1. The court granted extensions of the due date pursuant to motions filed March 15, March 29 and April 15, 1991, with the consent of defendants, on Mr. Kazangian's representations (and subsequently those of his counsel) that he was obtaining counsel and that his counsel needed time to study the documents and to prepare the appropriate motion papers.

The most recent due date for filing of Mr. Kazangian's Rule 56.1 motion was April 19, 1991. Mr. Kazangian failed either to file his motion or to request a further extension. On May 13, 1991, defendants, not having heard from Mr. Kazangian, filed a motion to dismiss the action for lack of prosecution and failure to comply with the scheduling order.

Discussion

Plaintiff originally brought this action *pro se,* and subsequently retained the attorney who represented him during the proceedings from which he now appeals. As indicated, plaintiff requested extensions, which the government did not oppose. The last request came from plaintiff's attorney, who requested an extension until April 19, which deadline he did not meet. Mr. Kazangian's counsel claims that Mr. Kazangian "had prepared documents resembling a letter brief which did not contain nor address the issues of law necessary for a proper adjudication of his case." Affirmation at 1. Counsel appears to claim that he miscalculated the amount of time that he would require to review the administrative record and prepare a motion. The court has reviewed the record and does not find it to be especially voluminous. As counsel represented Mr. Kazangian in the proceedings below he should have been able to prepare timely motions. Furthermore, this is not a valid reason for failure to seek a timely extension. The court can only assume at this point that Mr. Kazangian and his attorney have ignored the court's

deadline because they believe that it is in their best interest to do so. They are incorrect.

The normal procedure of stay of revocation pending judicial resolution may create a motivation to employ tactics of delay. Although the court would be acting well within its discretion to dismiss this action for utilization of such tactics, the court believes it can end further flouting of its orders with the less terminal action of vacation of the current stay, which permits plaintiff to remain licensed pending these proceedings. Mr. Kazangian has already had the benefit of months of operating under these provisional conditions. Furthermore, the slipshod way that plaintiff has pursued, or failed to pursue, this action indicates that extending the time that Mr. Kazangian can continue acting as a customs broker pursuant to the stay is likely not in the public interest.

Therefore, defendants' motion to dismiss is denied. The court, however, orders stay of the revocation decision lifted, and plaintiff's customs broker's license shall accordingly be revoked pending resolution of this action. Plaintiff shall file his Rule 56.1 motion within thirty (30) days of this order. No further extensions will be granted and the court directs the clerk's office to dismiss this action if the motion is not timely filed.

Appeals to the U.S. Court of Appeals for the Federal Circuit

Central Soya Co. *v.* United States, 15 CIT ___, Slip Op. 91-18 (March 20, 1991), *appeal docketed,* No. 91-1324 (Fed. Cir. May 24, 1991).

Ipso Inc. *v.* United States, 14 CIT ___, Slip Op. 90-113 (Oct. 3013, 1990), final judgment (January 10, 1991), *appeal docketed,* Nos. 91-1236, -1257 (Fed. Cir. March 22 & April 4, 1991).

Norcal/Crosetti Foods *v.* United States, 15 CIT ___, Slip Op. 91-12 (Feb. 27, 1991), *appeal docketed,* Nos. 91-1295, -1346 (Fed. Cir. May 6, & June 11, 1991).

NTN Bearing Corp. *v.* United States, 15 CIT ___, Slip Op. 91-13 (February 28, 1991), *appeal docketed,* No. 91-1294 (Fed. Cir. May 6, 1991).

SKF USA, Inc. *v.* United States, 15 CIT___, slip op. 91-25 & order (April 8, 1991 & June 3, 1991), *appeal docketed,* No. 91-1368 (Fed. Cir. June 20, 1991).

United States *v.* Reul, 15 CIT ___, Slip Op. 90-92 & 91-6 (Sept. 12 & Feb. 8, 1991), *appeal dockted,* No. 91-1264 (Fed. Cir. April 9, 1991).

United Steel Workers of America *v.* McLaughlin, 15 CIT ___, Slip Op. 91-20 (March 22, 1991), *appeal docketed,* No. 91-1303 (Fed. Cir. May 8, 1991).

Decisions of the United Court of Appeals for the Federal Circuit

Aurea Jewelry Creations, Inc. *v.* United States, 13 CIT ___, Slip Op. 89-126 & order (Sept. 7 & Oct. 26, 1989), *aff'd,* No. 90-1147 (Fed. Cir. May 6, 1991).

Matsushita Electric Industrial Co. *v.* United States, 14 CIT ___, Slip Op. 90-95 (Sept. 25, 1990), *rev'd,* Nos. 91-1033, -1052 (Fed. Cir. April 3, 1991).

PPG Industries *v.* United States, court order of Oct. 27, 1987, *aff'd,* No. 88-1175 (Fed. Cir. April 24, 1991).

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